

February 9, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Valiant Detective and Security Agency

Date of Filing: December 10, 2003

Case Number: TFA-0051

On December 10, 2003, Valiant Detective and Security Agency (Valiant) filed an Appeal from a determination issued to it on November 7, 2003, by the National Energy Technology Laboratory (NETL) of the Department of Energy (DOE). That determination concerned a request for information that Valiant submitted pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. If the present Appeal were granted, NETL would be ordered to release the requested information or to issue a new determination.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information which may be withheld at the discretion of an agency. 5 U.S.C. § 552(b); 10 C.F.R. § 1004.10(b). The DOE regulations further provide that a document exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

Valiant filed a FOIA request seeking contract information regarding K-Ray Security, Inc., Contract No. DE-AC2600NT40780. In its November 7, 2003 determination letter, NETL identified a number of documents responsive to Valiant's request. However, NETL withheld portions of this information pursuant to Exemptions 2 and 4 of the FOIA. *See* November 7, 2003 Determination Letter.

On December 10, 2003, Valiant filed the present Appeal with the Office of Hearings and Appeals (OHA). In its Appeal, Valiant challenges NETL's withholding of information it believes is non-proprietary. Specifically, Valiant asserts that "once awarded, a contract file and all of its contents fall into the public domain." *See* Appeal Letter at 1. Valiant asks that the OHA direct NETL to release the withheld information.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. Following an appropriate request, agencies are required to search their records for responsive documents. After conducting a search for responsive documents under the FOIA, the agency must provide the requester with a written determination notifying the requester of the results of that search, and if applicable, of the agency's intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The statute further requires that the agency inform the requester of its right "to appeal to the head of the agency any adverse determination." *Id.*

The written determination letter serves to inform the requester of the results of the agency's search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency's response to its request was adequate and proper, and provides this office with a record upon which to base its consideration of an administrative appeal.

It therefore follows that the agency has an obligation to ensure that its determination letters: (1) adequately describe the results of the searches, (2) clearly indicate which information was withheld, and (3) specify any exemption under which information was withheld. *Burlin McKinney*, 25 DOE ¶ 80,205 at 80,797 (1996). It is well established that a FOIA determination must contain a reasonably specific justification for withholding material that is responsive to a FOIA request. *See Deborah L. Abrahamson*, 23 DOE ¶ 80,147 (1993). A specific justification is necessary to permit the requesting party to prepare a reasoned appeal and to allow this Office to perform an effective review of the initial agency determination. Without an adequately informative determination letter, the requester and the review authority must speculate about the adequacy and appropriateness of the agency's determinations. *Id.* In addition, the FOIA requires the agency to provide to the requester any reasonably segregable portion of a record after deletion of the portions that are exempt. *See* 5 U.S.C. § 552(b). *See also FAS Engineering Inc.*, 27 DOE ¶ 80,131 (1998), quoting *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (factual material must be disclosed unless inextricably intertwined with exempt material).

In the present case, NETL withheld responsive information under Exemptions 2 and 4 of the FOIA. In its determination letters, NETL provided Valiant with overly vague explanations regarding how Exemptions 2 and 4 apply to the responsive information. Instead of providing specific justification for applying Exemptions 2 and 4 to the material withheld in this case, NETL has merely restated the language of Exemptions 2 and 4, without adequately explaining the reasons why NETL concluded that the responsive information is exempt from disclosure under the provisions of the FOIA. We find these explanations to be insufficiently informative and short of what is legally required.

Accordingly, we shall remand this matter to NETL either to release to Valiant all of the information responsive to its request or to issue a new determination adequately supporting the withholdings of the information. If a new determination is issued, NETL should include, for each portion of withheld

information, a statement of the reason for denial, a specific explanation of how any applicable exemption applies to the information withheld and a statement why discretionary release is not appropriate. *See* 10 C.F.R. § 1004.7(b)(1). NETL should further review each document for the possible segregation and release of additional non-exempt material. *See* 10 C.F.R. § 1004.7(b)(3).

It Is Therefore Ordered That:

(1) The Appeal filed by Valiant Detective and Security Agency, OHA Case No. TFA-0051, on December 10, 2003, is hereby granted in part as set forth below in Paragraph (2) and denied in all other respects.

(2) This matter is hereby remanded to the National Energy Technology Laboratory of the Department of Energy, which shall either release the responsive information withheld in its November 7, 2003 determination or issue a new determination in accordance with the instructions set forth above.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 9, 2004